UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

MALIBU MEDIA, LLC.

Plaintiff,

v.

JOHN DOE subscriber assigned to IP address 98.243.118.0

Defendant.

Case No. 14-cv-12471

HONORABLE JOHN CORBETT O'MERA DISTRICT COURT JUDGE

HONORABLE R. STEVEN WHALEN MAGISTRATE JUDGE

REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TO QUASH THE SUBPOENA ISSUED TO COMCAST CABLE HOLDINGS, LLC

Defendant John Doe, by and through counsel, hereby submits this reply brief in support of John Doe's motion to quash the subpoena issued to third-party Comcast Cable Holdings, LLC.

While plaintiff relies exclusively on unpublished opinions interpreting Fed. R. Civ. P. 45, "unpublished opinions are never controlling authority." *Fonseca v. Consolidated Rail Corp*., 246 F.3d 585 (6th Cir. 2001); *see United States v. Sanford,* 476 F.3d 391, 396 (6th Cir. 2007) (noting that unpublished opinions are not binding precedent under the doctrine of stare decisis). Further, plaintiff did not even attach any of these unpublished opinions to its brief, and this Court is not required to consider them. "[W]hen citing

unpublished opinions, copies of those opinions should be attached to the relevant brief." *Ashiegbu v. Purviance*, 74 F.Supp.2d 740 (S.D. Ohio 1998).

Under Fed. R. Civ. P. 26(d)(1):

> A party may not seek discovery *from any source* before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order (emphasis added).

None of the exemptions of Fed. R. Civ. P. 26(a)(1)(B) apply in this case. Plaintiffs here seek discovery from John Doe's internet provider, but there has been no Rule 26(f) conference as of yet. Therefore, plaintiff's subpoena is premature, and should be quashed.

In a similar case where a purported holder of a copyright of pornographic material sued unnamed defendants in federal court for copyright infringement for allegedly sharing the pornographic materials through BitTorrent, the United States Court of Appeals for the District of Columbia reiterated one judge's description of the plaintiff as a "porno-trolling collective." *AF Holdings, LLC v. Does 1-1058*, No. 12-7135 (D.C. Cir. May 27, 2014) (attached as Exhibit 1). The Court in *AF Holdings* further opined that if a subpoena compels disclosure of information that is not properly discoverable, then the

burden it imposes, however slight, is necessarily undue: why require a party to produce information the requesting party has no right to obtain? (*Id*.)

Plaintiff has failed to establish that it has the information it seeks actually pertains to the alleged copyright infringer. Instead, plaintiff argues that even if the IP subscriber is not the infringer, the information would likely lead to the identity of the actual infringer. "[W]hen the purpose of a discovery request is to gather information for use in proceedings *other* than the pending suit, discovery properly is denied." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978) (emphasis added).

Therefore, the subpoena directed to third-party Comcast should be quashed. Plaintiff's subpoena is premature, and has not established that the information sought will likely to lead to admissible evidence for use in these proceedings. Accordingly, defendant John Doe respectfully requests that this Court quash the third-party subpoena.

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Dated: September 17, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2014, I electronically filed the foregoing Reply Brief in Support of Defendant's Motion for Protective Order to Quash The Subpoena Issued to Comcast Cable Holdings, LLC, with this Certificate of Service, with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

Dated: September 17, 2014

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